HIGH COURT OF UTTARANCHAL, NAINITAL

Criminal Appeal NO. 564 OF 2001
(Old No.2232 of 1980)

1. Ramesh @ Chotu S/O Mukand Lal,
   Resident of Ambiwala,
   P.S.Kotwali
   Dehradun

2. Subhash S/O Suraj Prakash
   R/O Wing No.6, Barrack No.1/2 Prem Nagar,
   P.S.Cantt. Dehradun

3. Shashi S/O Narendra Singh Rawat
   R/O Wing No.3, Barrack No.19/3 Prem Nagar,
   P.S.Cantt. Dehradun

4. Raghubir S/O Madha
   R/o Shankarpur,
   P.S.Sahaspur, Dehradun

5. Harsh Vir S/O Sahdev Singh
   R/O Wing No.6, Barrack No.17/8, Prem Nagar,
   P.S.Cantt. Dehradun.

……...Appellants

Versus

State of Uttaranchal

……. Opposite Party

Honb'le J.C.S. Rawat, J

This is an appeal against the Judgment and order of Shri V.K.Agrawal, Additional Session Judge, Dehradun dated 30.9.1980 by which the learned Session Judge has convicted the appellants and sentenced to undergo five years RI and fine of Rs.1,000/- each under sections 399, 402 IPC. In default, the appellants had to undergo for six months RI. The appellants were also sentenced to undergo for one year R.I. under section25 Arms Act. It was further directed that both the sentences will run concurrently.

2. The brief facts leading to this prosecution are that the police party received an information over phone on 31.7.79 that all the appellants were gathering on road near Pirwala turn at Dhati Chakrata road Dehradun. On receiving the information on phone the police party headed by S.I. N.K.Tyagi alongwith other police personnel alongwith two independent witnesses namely Mohan Lal and Malkhan Singh reached on the spot. The police party divided into two parties. One was led by S.I. N.K.Tyagi and other was led by SI Malkhan Singh and they took their position at the spot immediately. Thereafter, the police party saw that three persons were coming to the place of occurrence and they started talking with each other and they had sufficient weapons and they could carry out the loot of the vehicles at the spot. After hearing the talks of the appellants, the police party satisfied that the appellants had intention to commit the loot. In the meantime, the appellants started to collect the stones at the spot so as to stop the vehicles at the place of occurrence. Meanwhile, a car came from the side of Sahaspur, at which those persons came at the road and indicated the car to stop. The Police party asked the appellants that they had been surrounded by the Police party. The police party flashed the torchlight and apprehended them at the spot. Out of six persons, one tried to escape from the place of occurrence. The persons who had been apprehended by the police, on being asked disclosed their names as Ramesh, Subhash, Shashi, Raghuveer Singh and Harshbir. Upon their search a pistol of 32 bore and five live cartridges and Rs.4/-

were recovered from the possession of Ramesh and from the search of Subhash country made pistol of 12 bore along with 5 live cartridges and Rs.5/- were recovered and from the possession of Shashi, a country made pistal 12 bore and 3 live cartridges and one packet of cigar containing 4 cigars and from the possession of Raghubeer a '*khukari*' (sharp edged weapon), two live corteges 12 bore and Rs.2/-were found and from Harshbir one lathi and torch were recovered. The recovery memo was prepared at spot and the copy of the memo was given to the appellants and thereafter FIR was lodged at the Police Station on 1.8.1979 at 2.00 A.M. Thereafter the necessary entries were made in the general diary and the investigation was entrusted to S.D.Yadav P.W.11 who prepared the site plan and recorded the statement of witnesses under section 161 Cr.P.C. He made the investigation as usual which culminated into the submission of the charge sheet.

3. The learned Session Judge framed the charges under section 399 and 402 I.P.C. against the appellants. The appellants denied the charge and claimed trial.

4. The prosecution produced Malkhan Singh S.I. P.W.1, Constable Vishram Singh P.W.2, Constable Mangla Nand, P.W.3, S.I.V.K.Upadhyay, P.W.4, Special Executive Magistrate Shri S.B.Srivastava, P.W.5, Constable Ram Kumar, P.W.7, Mohan Singh, P.W.8 Constable Shyam Singh P.W.9, Constable Jit Singh Upadhyay PW.10. The prosecution further adduced the

evidence of Shri S.D.Yadav P.W.11. He is the Investigating Officer of the case.

5. The appellants were examined under section 313 Cr.P.C. and stated that they had been falsely implicated and witnesses were telling lie against them. The appellants had further stated that they had been arrested from their respective houses and as such they had been falsely implicated.

6. The learned Session Judge after perusal of the evidence convicted the appellants as indicated above. The accused Jai Kishan was acquitted by the learned session Judge.

7. The prosecution adducted the evidence of S.I.Malkhan Singh P.W.1 and SI N.K.Tyagi P.W.6 who had supported the prosecution version. They had stated in their evidence that after receiving the information, they reached at the spot along with the Police force. Meanwhile two independent witnesses Malkhan Singh and Mohan Lal P.W.8 were taken by the police from the Prem Nagar Tiraha before proceeding to spot. They divided themselves into two parties. One was led by P.W.1 S.I. Sri Malkhan Singh and other was led by S.I. Sri. N.K.Tyagi, P.W.6. The Police party headed by S.I. N.K.Tyagi concealed themselves behind the bushes on the north east side of the road near MAZAR. The Police party headed by S.I. Malkhan Singh took the position on the other side of road behind the bushes. After a short while the appellants came at the spot and they started talking with each other that they had sufficient arms and they could commit the loot at the place of occurrence. The appellants also started to keep the

stones on the road and the appellants were waiting for a vehicle so that they might commit the loot at the place of occurrence. Meanwhile a car was found coming from the side of Sahaspur and those persons tried to stop the car at which the police party challenged the appellants. Out of these 6, 5 were arrested by the police at the spot and one person made his escape good from the spot. The person who escaped from the spot, could not be traced out. These witnesses have proved the recovery of the arms as well as live cartridges. The prosecution has also adduced the evidence of Sri Mohan Lal, P.W.8 who was public witness and was declared hostile. He had not supported the prosecution case.

8. It is further contended by the learned counsel for the defence that the place where the accused appellants were apprehended i.e. the place situated near Keri village. The P.W.1 has stated in his cross examination that "घटनास्थल से केरी गॉव पन्द्रह बीस कदम दूर नहीं है बल्कि सौ ढेड सौ गज दूर होगा । मौके पर 2–1/2 पौने तीन घंटा लग गया होगा।" It was further contented that the prosecution story is not probable and believable. The learned A.G.A. refuted the contention. The place of occurrence is as quite close to the village Keri, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing of dacoity and would take such a grave risk. Thus, this fact leads to the conclusion that the prosecution evidence does not inspire confidence.

9. In this case, it has been claimed by the prosecution that a single shot was not fired from the side of the appellants or from the side of the raiding parties in the entire transaction. As a matter of fact, the prosecution story was that the appellants had the fire arms and the live cartridges. This is rather unlikely if bad characters had actually assembled and were preparing to commit the loot and they had arms and ammunition with them. In such a situation they did not attack the police party on being challenged by S.I.Malkhan Singh P.W.1 or S.I.N.K.Tyagi P.W.6. It has been indicated in the FIR Exh Ka 11 that "घेरकर सामने से रोकने के लिए आवश्यक मारपीट कर 5 बदमाशों को वहीं सडक पर पकड लिया।" P.W.6 S.I.N.K.Tyagi has also stated in his evidence that "दोनो पार्टियों ने बदमाशों को करीब सवा ग्यारह बजे रात मामूली मारपीट करके 5 को पकड लिया और एक दूर की तरफ नदी की तरफ भाग गया।" It means that they sustain the injuries during their arrest. Constable Vishram Singh P.W.2 had stated in his evidence that "मुल्जिमान जब चौकी पर दाखिल हुए थे तो उनके मामूली चोटें थी ऐसी नहीं थी जो डाक्टरी मायना करायी जाये। रमेश के सात चोटें लिखी है। सुभाष के आठ चोटे शशी के दो चोटे, रघुबीर के एक, हर्ष बीर के तीन चोटे थी। प्रत्येक मुल्जिम के नीलू निशान के चोटे मौजूद थी।" It is revealed from the evidence of P.W.2 Vishram Singh that the injuries were found on the person of the appellants but the prosecution did not get them medically examined by the Medical Officer. The prosecution no doubt claimed that the appellants received the injuries but the prosecution has not filed the medical certificate to show that the appellant did

receive any injury in the transaction of the raid and arrest.

10. In the instant case the police had come with a stereotype story that on receiving secret information that a gang of dacoits would commit dacoity near Dhali Chakrata Road, Dehradun and the gang would assemble on the road. The usual story of taking witnesses making the parties etc. and the conversation imputed to the dacoits was that it was now time that they should start to stop the vehicles and commit the dacoity and there upon they were challenged and had been over powered and same of them were arrested and recoveries of various arms were made form their possession. P.W.6 N.K.Tyagi has stated in his evidence that after hearing the conversation between the appellants, the raiding parties satisfied themselves that the appellants had the intention to commit the loot. The challenge was made to the dacoits and they had been over powered. It is difficult to believe that the dacoits would unnecessary entered into the conversation as to whether they had to commit dacoity and that too in such a loud voice that the police party hiding at a considerable distance would be able to hear them and that even if they discussed the detail of what they have to do and would indicate how they would commit the robbary. The appellants would discuss such matters in whispers. Thus the prosecution evidence is unnatural (see Karam Singh Vs State of UP 1988 (25) Allahabad Criminal Cases page 352). I also agree that the prosecution story is not acceptable that the conversation was going on amongst dacoits and it could

be heard by the police parties. The main architect of the raiding parties is S.I. Sri N.K.Tyagi P.W.6 and he called the necessary force from the Cantt. Police Station and he as a matter of fact was leading both the parties at the spot. P.W.1 S.I.Malkhan Singh has stated in his evidence that "त्यागी जी ने हम सब लोगों को हिदायत दी थी कि हम लोग अपनी पोजिशन आउट नहीं करेंगे और मेरे आदेश का पालन करते हुए काम करेंगे। एन के त्यागी की पार्टी सडक के उत्तर पूरब में झाडियों में नाली के अंदर मजार के पास आकर छिप गए। मेरी पार्टी के लोग सडक के दूसरी ओर झाडियों में छिप गए।" The dacoits came and sat beneath the tree of Toon which has been shown at place 'D' in the site plan Ex.Ka.21. The first raiding party headed by S.I.-Malkhan Singh P.W.1 has been shown at place 'F' and other party headed by S.I.N.K.Tyagi P.W.6 has been shown at place 'E'. The site plan reveals that the distance between 'D' & 'E' is about 10 paces. In the ordinary course these witnesses were unlikely to be believed to over hear the conversation made by the culprits amongst themselves as claimed by them. In the present case, it is difficult to accept the testimony of the prosecution witnesses that they had over hear the conversation amongst the bad characters. In the instant case it is also pertinent to mention here that P.W.1 S.I. Malkhan Singh has stated in his evidence that

"मुजजिमान में से किसी को न हथकडी लगायी थी न किसी चीज से बॉधा था। प्रत्येक मुलजिम को दो आदमियों ने दोनों तरफ से एक एक हाथ से पकड लिया था।" The prosecution has also claimed that the appellants were dacoits and bad characters and they were not tied by any other thing. They had an opportunity to make their escape good but they did not

do so. This fact also creates doubt about the presence of the prosecution witnesses at the spot. Apart from that the prosecution has also claimed that the dacoits indicated to stop the car which was coming from the side of Sahaspur. In the meantime the raiding party challenged the dacoits. The driver of the car turned his car and went back. Sometimes the prosecution had stated that this was a private car and sometimes it was said that it was a taxi. Apart from that there are some other material discrepancies in the evidence of the prosecution witnesses. P.W.1 S.I.Malkhan Singh had stated in his evidence that the stones collected by the appellants on the road were not taken into the possession by the police whereas Constable Ram Kumar, P.W.7 has stated that the stones were taken into the possession by the S.I. P.W.2, Vishram Singh has stated that the stones were not sealed and they were kept outside the Malkhana. Now these stones are not available there. He was not able to tell as to where these stones had gone. Thus these are also material discrepancies in the evidence of the prosecution. The entire perusal of the evidence reveals that the evidence of the prosecution is not credible, cogent and believable.

11. It was further submitted that the only independent witness Shri Mohan Lal P.W.8 had not supported the prosecution version. It was further submitted that the other public witness Malkhan Singh was not produced before the Court. The prosecution has not assigned any reason not to produce the independent witness

Malkhan Singh. In this connection, it would be worthwhile to mention that there are two Malkhan Singh, one is S.I.Malkhan Singh who has been produced as P.W.1 and there was another public witness Malkhan Singh who had not been produced by the prosecution. It was further submitted that testimony of the police officers cannot be relied upon without the corroboration by any independent witness. The learned counsel for the appellants further submitted that the testimony of the police witnesses can be discarded on this score alone. The learned AGA refuted the contention. It is the settled position of law that the prosecution witnesses being the police officers, are not sufficient to discard their evidence. It is to be mentioned that all the police officers produced as the witnesses of fact had not to be constituted as a evidence of one man. If the evidence of the police officers inspire confidence, their testimony can be relied upon and the accused can be convicted solely on the basis of their evidence. The evidence of the police officers has to be scrutinized carefully where the public witnesses had been declared hostile of they are not supporting the prosecution case. In the instant case the police witnesses do not inspire confidence and the evidence with regard to the arrest and recovery have been found doubtful.

12. All the above noted facts and circumstances cast a grave shadow of doubt over the prosecution case and the appellants are entitled to be acquitted.

13. In view of the foregoing discussion, I am of the view that the learned Session Judge has erred in holding that the evidence of the prosecution witnesses was credible and cogent with regard to the recovery and arrest.

14. The appeal is allowed. Conviction and sentence awarded by the trial court per judgment and order dated 30.9.1980 are set aside. The appellants are acquitted from the charge levelled against them. The appellants are on bail. Therefore, they need not surrender. Their bail bonds are cancelled and sureties discharged.

15. Let the lower court record be sent back to the court concerned and the compliance report be submitted within a period of two months.

(J.C.S. Rawat, J.)

Dated 14.10.2004

P.Anjali